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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

RONALD EUGENE ALL, *Petitioner,*

v.

STATE OF NORTH CAROLINA, *Respondent.*

CARLTON OSCAR WEAVER, *Petitioner,*

v.

STATE OF NORTH CAROLINA, *Respondent.*

Joint Petition for Writs of Certiorari to the Supreme Court of North Carolina and the Court of Appeals of North Carolina

Petitioners Ronald Eugene All and Carlton Oscar Weaver pray that writs of certiorari be issued to review the judgments and order of the Supreme Court of North Carolina, which was filed in this proceeding on March 6, 1973, denying the petitioners' petitions to the Supreme Court of North Carolina for writs of certiorari to review the opinion and judgments of the Court of Appeals of North Carolina, which latter opinion and judgments were filed on January 17, 1973. Both judgments involve identical and closely related questions.

OPINIONS BELOW

The opinion of the Court of Appeals of North Carolina is reported at 17 N.C. App. 284, 193 S.E.2d 770 (1973) and is reproduced in Appendix A. The denial by the Supreme Court of North Carolina of certiorari in these causes is reported at 17 N.C. App. 284, 193 S.E.2d 633 (1973), and is reproduced in Appendix B.

JURISDICTION

The judgments of the Supreme Court of North Carolina were entered on March 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Whether it is constitutionally permissible under the Fourth and Fourteenth Amendments to the Constitution of the United States for state law enforcement officers to conduct a general exploratory search of a motor vehicle without either probable cause or reasonable suspicion on objective consideration to believe the occupants guilty of any offense other than a traffic violation?

Subsidiary issues presented are as follows:

A. Whether a general search of the vehicle not tied to the need to obtain evidence of the traffic offense or to protect the police officers against concealed weapons is justified?

B. Whether such a general search may be justified as a police inventory where the police neither purport to be animated by the need for an inventory nor take measures consistent with an authentic inventory?

C. Whether impoundment and inventorying, pursuant to an arrest for a traffic violation, are constitutionally permissible when (1) impoundment is not authorized by statute or other legal authority, or (2) when the inventory occurs before the arrestee has been afforded an opportunity to make bail in lieu of incarceration?

II. Whether the test of "harmless constitutional error" in criminal trials under *Fahy* v. *Connecticut* and *Chapman* v. *California* turns merely upon whether a conviction could have been sustained without the tainted evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this petition for writs of certiorari are the Fourth and Fifth Amendments to the United States Constitution in so far as they imbody fundamental rights guaranteed by the Fourteenth Amendment to the United States Constitution. These provisions are set forth in Appendix C, *infra,* pp. 6a-7a.

STATEMENT OF THE CASE

Petitioners Ronald Eugene All and Carlton Oscar Weaver were convicted in the Superior Court of Chatham County, North Carolina, for breaking and entering into a meat packing plant and for the larceny of packaged hams and loose hams therefrom.

On March 20, 1971, while driving a truck on an interstate highway in the State of Virginia, Petitioner Ronald All, accompanied by Petitioner Carlton Oscar Weaver, was stopped by an officer of the Virginia State Police, who had no reports of any criminal activity relating to the petitioners. The patrolman sig-

nalled them to pull to the shoulder of the road because he observed that Mr. All was driving the vehicle with all but 10 to 12 inches of the front windshield obscured by a piece of cardboard, which had been inserted across the dashboard to replace the shattered part of the windshield. Under a Virginia statute, driving with any obstruction over the windshield is a traffic violation. Code of Virginia, Sec. 46.1-290.

Upon making an inspection of the driver's license, registration card and license tags, the officer learned that the truck was registered in the name of Petitioner Weaver's wife. The officer then climbed up on the truck's axle and peering over the truck's side boards saw that it was loaded with assorted sliced and whole hams. The side boards to the truck bed were high enough to block the officer's view of the cargo while he was standing on the ground. (R. 11-16.)[1]

The officer interrogated each of the petitioners in isolation about where they had obtained the load of hams and received conflicting stories. The officer then placed Mr. All under arrest for reckless driving and took him to the nearest sheriff's office. Suspecting that, as he testified, "I had a felony on my hands", the officer alerted the investigative division of the state police, and had another officer drive the truck to the sheriff's office where it was parked. According to the officer's testimony, he brought Mr. All before a magistrate who set bond. (R. 15-16.)

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[1] References prefaced with the initial "R." are to the Record prepared for the Court of Appeals of North Carolina, which has been certified to this Court. Occasional references prefaced "Tr." are to the verbatim transcript of the trial, only portions of which are reproduced in the Record.

While Petitioner All was still in custody, the Virginia State Police received a radio report of the theft of a large quantity of hams from a meat packing plant in North Carolina. However, the radio report contained no description either of the suspects or of the vehicle involved in the crime. Then, a detective from the investigation division interrogated All and after hinting at leniency for All, obtained a confession in which Mr. All informed the detective that a pair of bolt cutters which had been used to break and enter the meat plant could be found in the cab of the truck. Thereupon, without obtaining a search warrant, the detective searched the cab of the truck and seized the bolt cutters that he found there. (R. 17-19.)

Petitioner All and Petitioner Weaver were returned to North Carolina where they stood trial for the theft of the hams. The trial court denied the petitioners' motion to suppress as evidence the cargo of hams on the grounds that the Virginia highway patrolman "had a right to stop the defendants and the truck for an apparent violation of Virginia law and to inspect the vehicle after stopping it" (R. 25.). Although suppressing the statements given to the patrolman as being inconsistent with *Miranda*,[2] and Mr. All's confession because it was induced by indirect promises of leniency, the trial judge refused to suppress the bolt cutters because he ruled that the detective had probable cause to search the vehicle, and that as the vehicle had already come into police custody, the search and seizure were "not in violation of any constitutional rights" (R. 25.).

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The State obtained a conviction based in part upon the evidence of petitioners' possession of the cargo of hams and of the bolt cutters. From paint particles found on the bolt cutters, a forensic chemist, called as a witness for the State, identified the tool as being the same one used to break the enclosure at the burglarized meatpacking plant. (R. 46.)

On assignment of error, the Court of Appeals of North Carolina held that the officer knowing "he must impound the truck until the windshield could be repaired", merely fulfilled his duty to inventory the cargo to protect the owner from loss and himself from liability. (App. B), 193, S.E.2d at 772. Further, the court held that assuming the bolt cutters were the poisonous fruits of the unlawful confession, their admission was harmless error as there remained other evidence "more than sufficient to support their convictions", (App. B, pp. 2a-6a), 193 S.E.2d at 772. The Supreme Court of North Carolina denied a petition for certiorari to review the decision of the Court of Appeals (App. A, p. 1a).

REASONS FOR GRANTING THE WRITS

I. Writs Should Be Issued To Determine the Validity of a Police Search of a Motor Vehicle Absent Probable Cause of Any Offense Other Than a Traffic Violation.

1. The writs should be granted because this Court has never decided the recurring constitutional question of whether in stopping a motorist for a traffic violation the police may properly conduct a general exploratory search of the vehicle without probable cause to believe that any offense other than a traffic violation has occurred. Also, the court below decided the case in a

manner probably inconsistent with the applicable principles announced by this Court.

In *Dyke* v. *Taylor Implements Mfg. Co.*, 391 U.S. 216, 220 (1967), this Court in holding constitutionally invalid the search of an automobile at a time and place remote from arrest, specifically reserved decision on the issue here presented, of "[w]hether or not a car may constitutionally be searched incident to arrest for a traffic offense . . .". This question and the inextricably related question of the validity of a search of the person, incident to an arrest for a traffic violation, have recurrently vexed state and federal courts, giving rise to a conflict among them which this Court should resolve.[3]

The most dramatic indication of the need for this Court's intervention is the conflict arising between the two federal appellate courts sharing jurisdiction within the District of Columbia. Compare *U.S.* v. *Robinson*, D.C. Cir., No. 23-734, decided October 31, 1972 (*en banc*), cert. granted, No. 72-936, March 19, 1973, 41

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[3] For those cases holding such a search to be invalid, see e.g., *Stidham* v. *Wingo*, 452 F.2d 837 (6th Cir. 1971) *United States* v. *Davis*, 441 F.2d 28 (9th Cir. 1971); *Barrentine v. United States*, 434 F.2d 636 (9th Cir. 1970); *United States* v. *Humphrey*, 409 F.2d 1055 (10th Cir. 1969); *Grundstrom* v. *Beto*, 273 F. Supp., 912 (N.D. Tex. 1967); *United States, ex rel. Krogness* v. *Gladden*, 242 F. Supp. 499 (D. Ore. 1965); *United States* v. *One 1963 Cadillac Hardtop*, 224 F. Supp. 210 (E.D. Wis. 1963); *People* v. *Superior Court of Los Angeles County* [*Simon*], 101 Cal. Rptr. 837, 496 P.2d 1205 (*en banc*). Also see cases cited, *U.S.* v. *Robinson*, *supra* sl. op. at pp. 37 and 38, n. 39. Recent cases holding to the contrary are e.g. *U. S.* v. *Simmons*, D.C. Ct. App. No. 6511, decided March 8, 1973, 12 Cr. L. Reptr. 2536; *State* v. *Gustafson, Fla.* 258 So.2d 1 (1972); *State* v. *Giragosian*, — R.I. —, 270 A.2d 921 (1970); *State* v. *Coles*, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969); *Watts* v. *State, Miss.*, 196 So.2d 79 (1967); *Lane* v. *State*, 424 S.W.2d 925 (Tex. Cr. 1967).

L.W. 3493, in which the United States Court of Appeals for the District of Columbia held such a search invalid, with the decision of the District of Columbia Court of Appeals in *U.S.* v. *Simmons,* D.C. Ct. App., No. 6511, decided March 8, 1973, 12 Cr. L. Reptr. 2536, sustaining the lawfulness of a general exploratory search of the person.

Moreover, this Court has already granted certiorari in *U.S.* v. *Robinson, supra,* to review the propriety of searches of the person upon an arrest for a traffic violation. Accordingly, the Court should take the occasion presented by the instant case to review together the closely related constitutional questions of searches of a vehicle and of the person under similar circumstances.

In addition, the courts below decided the question in a manner probably inconsistent with the principles announced by this Court. For, in dealing with searches of vehicles,[4] other than for weapons within reach of the occupants, the Court has observed that the cases have "always required that the officers conducting the search, have 'reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search' ". *Dyke* v. *Taylor Implements*

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[4] The action of the patrolman here in climbing upon the truck to look into the bed entailed all of the attributes of a search, whether characterized as such or as a police inventory. (The inventory question is discussed in section 2, *infra.*) Here, the officer inspected places closed from public or general view, using "some measure of force or intrusion". *State* v. *Ashby,* Fla. 245 So.2d 225, 227 and cases cited. Accord. *Holland* v. *State,* 93 Okla. Cr. 180, 226 P.2d 448 (1951), where the officer climbed upon the fender of a truck to see over the side boards into the cargo.

Mfg. Co., 391 U.S. 216 (1967). Even pursuant to investigative stops based upon objective considerations giving rise to a reasonable suspicion, "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry* v. *Ohio,* 392 U.S. 1 (1967). Here, the search was neither based upon probable cause of the commission of an offense for which further evidence was necessary, nor upon the need for a circumscribed search for weapons. See *U.S.* v. *Robinson, supra.*

2. The reliance by the Court of Appeals, below, upon the characterization of the officer's action as an inspection or inventory incident to impoundment of the vehicle, raises an important issue of what distinguishes an inventory from a constitutionally regulated search and seizure. In this case, the theory of a police inventory was first introduced as a justification for the police's conduct by the Court of Appeals below. Neither the police officer nor the trial court intimated that the cursory examination of the cargo was prompted by the usual considerations underlying an inventory, which are to secure the owner against loss and to protect the officer from liability. Nor, does the evidence disclose any of the ordinary indicia of such an inventory such as a systematic enumeration and recording of the quantity and nature of the cargo. (R. 11-16.)

The court below wrongly assumed that under Virginia law the truck could not have been driven until the windshield was replaced. For, as the Virginia patrolman testified "you have to have your entire windshield or nothing at all, you can't have a cracked glass", (Tr. 30). Therefore, upon removing all of the windshield the vehicle would have been operable. In-

deed, rather than calling a tow truck (which incidentally, would not have necessitated a police inventory), the patrolman had a second officer drive the truck to the sheriff's office.

An unauthentic or sham inventory can no more be squared with the Fourth Amendment's guarantees than can a search based upon an improper arrest. See *Carroll* v. *U.S.*, 267 U.S. 132 (1925); *Weeks* v. *U.S.*, 232 U.S. 383 (1914). Indeed, such pretextuous inventories have been condemned by other courts (see e.g. *U.S.* v. *Adams*, 424 F.2d 175, (5th Cir. 1970); *Gonzales* v. *State*, — Okla. Cr. —, 12 Cr. L. Rptr. 2537 (decided March 13, 1973)), and to sustain one is clearly inconsistent with the applicable principles announced by this Court.

3. Another important issue raised here is whether a police inventory is constitutionally valid where the impoundment is not authorized by statute or other appropriate authority. The Court of Appeals below disregarded the absence of any Virginia statute which would authorize the officer to seize or impound the truck.[5] Thus, in effect, the court held that an inven-

[5] The Court of Appeals below cited no Virginia statute or regulation which authorized the patrolman to impound or seize the vehicle here. While various provisions of the Virginia Code authorize impoundment or seizure in specified circumstances, such as where the vehicle had been used to transport contraband liquor, stolen animals or other stolen goods (Code of Virginia, Sec. 4-56, 18.1-103, 18.1-107.1); where a vehicle is being operated without a license or with a suspended license, (Sec. 46.1-351.1); or where damages have been inflicted on another in an automobile accident, (Secs. 8-646.3 to 8-646.5); our research has disclosed no such authority for impoundment pursuant to an arrest for reckless driving or operating with defective equipment, the offenses for which Petitioner All was cited. See Code of Virginia, Sec. 46-1-179, (App. D, p. 8a).

(footnote continued on page 11)

tory pursuant to an unauthorized police impoundment is permitted by the Fourth Amendment.

Moreover, the North Carolina court's decision on this issue most probably conflicts with such decisions of this Court as *Cooper* v. *California,* 386 U.S. 58 (1967) where one of the factors relied upon in sustaining the validity of a search of the automobile was that it had been lawfully impounded under state law. See *Harris* v. *United States,* 390 U.S. 234, 237 (1968) (Douglas J. concurring) where Mr. Justice Douglas articulated as the basis for holding evidence admissible that it was discovered in the car, while the car was lawfully in police custody. Also, an inventory not justified as the product of an authorized impoundment conflicts with the principles in *Terry* v. *Ohio, supra,* requiring that warrantless searches be strictly limited by the purposes which justify them. This view has been adopted by other courts which have passed on the question.[6]

4. Since there was no legal basis for the police to impound or seize the truck operated by Mr. All, the Court should explore the question of whether the police had any duty or justification in taking even temporary custody of the vehicle for safekeeping absent the owner's express authorization. The court below assumed that the police had to impound the vehicle rather

(footnote 5 continued . . .)

Section 46.1-2 of the Virginia Code provides that if a vehicle is left on the highway in a position which constitutes a hazard to traffic or if it is left unattended on the highway for more than 24 hours, the police "may remove it or have it removed to the nearest storage garage for safekeeping". However, in the instant case neither of these two criteria were shown to have existed. In any event, the police here did not act in accordance with this section by removing the truck to a storage garage.

[6] *Williams* v. *U. S.*, 107 A.2d 223 (D.C. Mun. Ct. App. 1961); *Pigford* v. *U. S.*, 273 A.2d 837 (D.C. Ct. App. 1971); *U. S.* v. *Pannell,* 256 A.2d 925 (D.C. Ct. App. 1969).

than leave it on the road, or call a tow truck. However, one court, at least, has held in similar circumstances that the police may not seize or inventory a vehicle even for the purpose of securing it without the driver's permission. *People* v. *Miller,* 7 Cal. 3d 219, 101 Cal. Reptr. 860, 496 P.2d 1228 (1972). The court there said, "the inventory search violated the Fourth Amendment's proscription of unreasonable searches and seizures, [and] the vehicle owner's interest in privacy outweighs any conflicting interests in the preservation of the owner's property during that period when he was absent from his car." *Ibid.* at p. 863.

Moreover, even assuming the impoundment to be lawful, in *Harris* v. *United States,* 300 U.S. 234 (1968), this Court reserved decision on that very issue. There, it held that a police officer's action in rolling up the window of a *lawfully* impounded car t oprotect it from the rain, did not constitute a search or inventory and, therefore, that the evidence found in the course of such action was admissible. However, the Court indicated that a police regulation requiring a general search and inventory of all impounded vehicles presented a serious constitutional issue under the Fourth Amendment, an issue which the Court decided that it need not reach under the facts of that case.

5. Assuming that in some exigent circumstances the police may be justified in taking temporary custody of a vehicle incident to an arrest, the decision below raises the question of whether such custody and a related inventory search may be initiated before the defendant has been accorded a right to make bail and thus to avoid detention. In the instant case Petitioner Ronald All was arrested for reckless driving. For such an offense Section 46.1-179 of the Code of Vir-

ginia (App. D. *infra* p. 8a) required the officer to take Petitioner All forthwith before the nearest or most accessible judicial officer for a hearing to determine whether All should be detained on the traffic offense or admitted to bail. However, the search of All's vehicle which the Court of Appeals below characterized as police inventory, occurred on the highway before Mr. All had been arrested and before it had been determined by the magistrate that he should be detained. Accordingly, the purported inventory took place before it became apparent that temporary police custody of the vehicle would be necessary.

This question, not previously decided by the Court, is currently before it in *U.S.* v. *Robinson,* D.C. Cir. No. 23-734, decided October 31, 1972, cert. granted, No. 72-936, March 19, 1973, 41 L.W. 3493. Moreover, the decision below holding that such premature inventory constitutes a reasonable search conflicts with the applicable principles announced by the Court. The requirement of *Terry* v. *Ohio, supra,* that searches must be limited by the purposes for which the arrest or police check was made, are applicable here, and prohibits inventories unless they are tied to the clearly established need for the police to take custody of the automobile. See, *U.S.* v. *Adams,* 424 F.2d 175 (5th Cir. 1970). Other courts which have dealt with the problem and with the related problem of a predetention search of the person have so held.[7]

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[7] *U.S.* v. *Mills,* — F.2d —, D.C. Cir., No. 22, 444, decided May 10, 1972 (*en banc*); *U.S.* v. *Robinson, supra; Carpio* v. *Superior Court, County of Santa Barbara,* 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971); *California* v. *Mercurio,* 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970); *People* v. *Overlee,* 483 P.2d 222 (Colo. Sup. Ct. En Banc, 1971); *People* v. *Greenwood,* 484 P.2d 1217 (Colo. Sup. Ct. En Banc, 1971).

The foregoing questions involve important Constitutional problems which affect a large segment of the citizenry. For, traffic offenses probably bring more citizens into confrontation with the police than any other kind of law violation. "Very few drivers can traverse any appreciable distance without violating some traffic regulation". *U.S.* v. *Robinson, supra,* sl. op. p. 21. Consequently, the Court should grant certiorari to give authoritative guidance in this area.

II. The Court Below Adopted an Erroneous Standard for the Application of This Court's "Harmless Constitutional Error" Doctrine.

The Court of Appeals below erroneously held as "harmless constitutional error" the admission into evidence of the bolt cutters found in the truck operated and occupied by the petitioners. The confession of Ronald All which led directly to the discovery of this evidence was found to have been unlawfully obtained. Also, this evidence was the product of a warrantless search of the vehicle under bailment to Petitioner Weaver, which search was clearly remote in time and place from the arrest and unlawful under *Preston* v. *U.S.,* 376 U.S. 364 (1964).[8]

Nevertheless, the admission into evidence of the bolt cutters was held to be harmless error because the "remaining evidence .... was more than sufficient to support [the] convictions," (App. B., p. 5a). By so holding, the court below formulated a standard which had the effect of equating the "harmless constitutional error" rule with the standard applicable to a motion

[8] Though the Court of Appeals below suggested that there may have been other potential sources of knowledge of the cutters, the detective who seized them unequivocally testified that he learned of them from All's confession (R. 17). In any event, the decision of that court turned on harmless error rather than on the question of an untainted source (App. B pp. 4a-5a).

for directed verdict. This was plainly inconsistent with the applicable decisions of *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) and *Chapman* v. *California,* 386 U.S. 18 (1967).

As stated in *Fahy,* the appropriate standard "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Further, as the Court there said, "We are not concerned here with whether there was sufficient evidence on which the Petitioner could have been convicted without the evidence complained of." 375 U.S. at 86-87.

The contributory effect of the evidence relating to the incriminating bolt cutters was direct and compelling. It was the single item of evidence that unequivocally linked the petitioners to the scene of the crime, by virtue of the chemist's positive identification of that tool as being the one employed to burglarize the meat packing plant. (R. 46.) To be sure, there was other evidence, but it was all less conclusive. Fibers from a sweater similar to one worn by Mr. Weaver were found at the point of the break-in (R. 45-57). A truck generally matching the description of the one driven by Mr. All was seen in the vicinity of the packing plant on the night of the robbery. (R. 27-28). Finally, of course, the cargo of hams found in the possession of the petitioners was of the same quantity and character as those stolen, though the company distributed large numbers of such products throughout the southeastern states (R. 40).

Particularly as the evidence of the cargo should also have been excluded, the remaining untainted evidence plainly is not so overwhelming as to justify a ruling of harmless error. "An error in admitting plainly

relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless." *Chapman* v. *California,* 386 U.S. at 23-24.[9]

CONCLUSION

For the foregoing reasons, the petitioners request that their petitions for writs of certiorari be granted.

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[9] *Harrington* v. *California,* 395 U.S. 250 (1969), relied upon by the court below is clearly distinguishable. There the untainted evidence, including a valid confession of the defendant and eye witness testimony, was so overwhelming as to completely override the evidence erroneously admitted. Moreover, the Court there said:

> We do not depart from *Chapman;* nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. 395 U.S. at 254.

APPENDIX

APPENDIX A

No. 14PC FIFTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1973

STATE OF NORTH CAROLINA

v.

RONALD EUGENE ALL
CARLTON OSCAR WEAVER

Order Denying Petition for Writ of Certiorari to the N. C. Court of Appeals (7215SC777)

This matter came on to be considered upon a petition for writ of certiorari to the N. C. Court of Appeals to review its decision on the 6th day of March, 1973, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the said petition should be denied.

NOW, THEREFORE, it is ordered accordingly by the Court in conference that the petition be and the same is hereby denied, and that it be so certified to the Clerk of the N. C. Court of Appeals and to counsel for all the parties.

Witness my hand and official seal, this the 7th day of March, 1973.

???? J. NEWTON
Clerk of the Supreme Court

(Seal)

cc: Loflin, Anderson & Loflin, Attorneys at Law
Harris & McEntire, Attorneys at Law
Mr. Herbert F. Pierce, Solicitor
Mr. Howard P. Satisky, Assistant Attorney General

APPENDIX B

No. 7215SC777 FIFTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Fall Session 1972

STATE OF NORTH CAROLINA

v.

RONALD EUGENE ALL and
CARLTON OSCAR WEAVER

From Chatham

Appeal by defendants from McKinnon, Judge, 8 May 1972 Session of Superior Court held in Chatham County.

Defendants were charged in separate bills of indictment with felonious breaking or entering and felonious larceny.

The State's evidence tended to show the following. During the early hours of the morning of 20 March 1971 the premises of Hickory Mountain Farms, Inc., in Siler City, N. C., was unlawfully broken and entered and a large quantity of meat (packaged hams and loose hams) was unlawfully stolen therefrom. At about 2:10 a.m. on 20 March 1971 a "bluish truck" with wooden siding was observed driving away from the vicinity of Hickory Mountain Farms, Inc. At about 7:20 a.m. on 20 March 1971 a trooper with the Virginia State Police observed a blue truck travelling north on Route 220 in Virginia. Except for ten or twelve inches of glass on the driver's side the entire windshield of the truck was covered with cardboard. Driving with a windshield in such condition constitutes an offense in the State of Virginia, and therefore the trooper stopped the truck. Defendant All was driving and defendant Weaver was riding in the cab on the passenger side. Defendant All was placed under arrest

and defendant Weaver disappeared from the scene (he was arrested later in the day). The trooper inspected the load in the bed of the truck by stepping up on the axle or the wheel and looking over the wooden siding—there was no top cover on the bed of the truck. He observed loose hams and boxes with Hickory Mountain Farms, Inc., written on them. Another trooper, who called to the scene, drove the truck to the Franklin County jail. After defendant All was in custody for the motor vehicle violation, the Virginia State Police received, by radio, information of the theft of hams from Hickory Mountain Farms, and an investigator for the Virginia State Police went to the Franklin County jail to interrogate defendant. While the truck was still parked at the Franklin County jail, the investigator looked through the right side window of the cab of the truck and observed a large set of bolt cutters lying on the floorboard. These bolt cutters were found to have paint chips similar to the paint on the security bars which were cut on the Hickory Mountain Farms, Inc., premises. The fibers from defendant Weaver's sweater were similar to the fibers taken from the glass of the broken window at the Hickory Mountain Farms, Inc., premises.

Statements made by defendant All at the scene after he was arrested were excluded from evidence because he had not been given the Miranda warnings. Statements made by defendant All during interrogation at the county jail were excluded from evidence because a hope of leniency was held out to him by the interrogating officer.

The defendants offered no evidence.

The jury returned verdicts of guilty as charged in both counts as to each defendant. Defendant All was sentenced to an active term of seven to ten years. Defendant Weaver was sentenced to an active term of ten years. Both defendants appealed.

Attorney General Morgan, by Assistant Attorney General Satisky, for the State.

Loflin, Anderson & Loflin, by Thomas F. Loflin, III, a nd Harris & McEntire, by Mitchell M. McEntire and Laura Jean Guy, for the defendant.

BROCK, *Judge.*

Defendants assign as error the admission of testimony by the Virginia State trooper of his observation of the load of hams in the cargo bed of the truck. They argue that the hams were not in "plain view" of the trooper because he had to climb up on the wheel or axle of the truck to see over the wooden siding. They argue, therefore, that the hams were discovered by means of a search which was not reasonably related to the offense for which All was arrested, which was not for purposes of protection or prevention of escape, and which was not founded on probable cause; and, consequently, was a search prohibited by the Fourth Amendment to the Constitution of the United States.

It seems to us that the arguments advanced by defendants are wide of the mark. In this instance, the officer knew he must impound the truck until the windshield could be repaired. Under such circumstances it was his duty to take reasonable precautions to protect defendants' cargo from loss or destruction. Also, it was his duty to protect himself and the State from charges of loss of cargo. In order to do these things it was necessary for him to know the nature and quantity of the cargo. His conduct in looking into the cargo bed was both reasonable and necessary under the circumstances. If his action can be classed as a search, it was certainly a reasonable search. It is only unreasonable searches which are prohibited by the Fourth Amendment. State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179. Once the trooper acquired knowledge of the cargo by a reasonable act, he was not required to

suppress this knowledge when the police radio bulletin later advised of the theft of a quantity of Hickory Mountain Farms hams.

The numerous cases relied upon by defendants are distinguishable upon the reason for the "search". For cases more comparable to the present case *See* 10 ALR 3d 314-354, § 9 [New] Making inventory of contents of impounded vehicle (Supp. 1972). In our opinion, the trooper's testimony concerning the load of hams was properly admitted in evidence.

Defendants next argue that the bolt cutters taken from the truck were found as a direct result of an illegal confession and, therefore, should have been excluded from evidence as was the confession itself. While there seem to have been sources of knowledge of the bolt cutters equally as clear as that obtained from the excluded confession, we do not feel it is necessary to dwell upon the question in this case. Conceding, arguendo, that the bolt cutters were the fruit of an illegal confession, their admission in evidence would constitute harmless error beyond a reasonable doubt. The remaining evidence against defendants was more than sufficient to support their convictions: a truck similar to theirs was seen driving from the vicinity of the break-in; the unequivocally identified stolen hams in defendants' possession in Virginia a few hours after the break-in; and fibers found at the scene of the break-in which matched one defendant's sweater. If it were error to admit the bolt cutters in evidence, in view of the total evidence, we hold such error to be harmless beyond a reasonable doubt. *See* Harrington v. California, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726; State v. Doss, 279 N.C. 413, 183 S.E. 2d 671; State v. Bell, 14 N.C. App. 346, 188 S.E. 2d 593.

We have carefully considered defendants' assignment of error relating to the allowance of opinion testimony by

one of the State's witnesses. Without belaboring the point, it is our opinion the evidence justified the trial court's finding that the witness was qualified to testify in the field of forensic chemistry. This assignment of error is overruled.

No error.

Judges CAMPBELL and GRAHAM concur.

A True Copy

THEODORE C. BROWN, JR.
Clerk of the Court of Appeals
of North Carolina

By ?? ?? ?? ?? ?? ?? ??
Deputy Clerk
January 23, 1973

APPENDIX C
Excerpted Amendments to the Constitution of the United States

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

* * * * *

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

Excerpted Sections of the Code of Virginia (in effect on March 20, 1971)

§ 46.1-178. Arrest for misdemeanor; release on summons and promise to appear; admitting to bail; violations.—(a) Whenever any person is arrested for a violation of any provision of this title punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46.1-179, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, such time to be at least five days after such arrest unless the person arrested shall demand an earlier hearing, and such person shall, if he so desires, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour, and before a court having jurisdiction under this title within the city, town or county wherein such offense was committed. Such officer shall thereupon and upon the giving by such person of his written promise

to appear at such time and place forthwith release him from custody.

(b) Any person refusing to give such written promise to appear shall be taken immediately by the arresting or other police officer before the nearest or most accessible judicial officer or other person qualified to admit to bail having jurisdiction under this title.

(c) Any person who wilfully violates his written promise to appear, given in accordance with this section, shall be guilty of a misdemeanor, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

(d) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and subject to removal therefrom upon complaint filed by any person in a court of competent jurisdiction. This section shall not be construed to limit the removal of a police officer for other misconduct in office. (Code 1950, § 46-193; 1950, p. 94; 1954, c. 174; 1958, c. 541.)

* * * * * * * * * *

§ 46.1-179. When arresting officer shall take person befor judicial officer.—If any person is: (1) Arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person; (2) believed by the arresting officer to have committed a felony; (3) believed by the arresting officer to be likely to disregard a summons issued under § 46.1-178; (4) charged with reckless driving; the arresting officer, unless he issues a summons, shall take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons required by § 46.1-178, who shall determine whether or not probable cause exists that such person is likely to disregard a summons, and may issue either a summons or warrant as he shall determine proper. (Code 1950, § 46-194; 1958, c. 541; 1966, c. 639).

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

FILED
SEP 4 1973
MICHAEL RODAK, JR., CLERK

No. 72-1625

RONALD EUGENE ALL,
Petitioner,

vs.

STATE OF NORTH CAROLINA
Respondent.

CARLTON OSCAR WEAVER,
Petitioner,

vs.

STATE OF NORTH CAROLINA
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO JOINT PETITION FOR WRITS OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72

RONALD EUGENE ALL,
Petitioner,

vs.

STATE OF NORTH CAROLINA
Respondent.

CARLTON OSCAR WEAVER,
Petitioner,

vs.

STATE OF NORTH CAROLINA
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO JOINT PETITION FOR WRITS OF CERTIORARI

OPINION BELOW

From a verdict of guilty of the offense of felonious breaking and entering and felonious larceny, and judgments of imprisonments entered by the Superior Court on the 11th day of May, 1972, defendants, Ronald Eugene All and Carlton Oscar Weaver, appealed to the North Carolina Court of Appeals. The opinion of the North

Carolina Court of Appeals (Intermediate Appellate Court) affirming the convictions of the trial court is reported in 17 N.C. App. 284, 193 S.E. 2d 770 (1973). The defendants joint petition for Writs of Certiorari to the North Carolina Court of Appeals was denied by the Supreme Court of North Carolina by judgments entered on March 6, 1973.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

IS IT CONSTITUTIONALLY PERMISSABLE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES FOR STATE LAW ENFORCEMENT OFFICERS TO CHECK THE CARGO INCIDENT TO A DETENTION OF A VEHICLE ON THE SIDE OF THE ROAD FOR A TRAFFIC VIOLATION WHEN SUCH INVESTIGATION IS CONDUCTED WITHOUT A SEARCH WARRANT?

II.

DOES THE TEST OF "HARMLESS CONSTITUTIONAL ERROR" IN CRIMINAL TRIALS UNDER *FAHY V. CONNECTICUT* AND *CHAPMAN V. CALIFORNIA* REQUIRE A REVERSAL IN EACH CASE WHERE CONSTITUTIONAL ERROR IS COMMITTED REGARDLESS OF THE INTENSITY OF COUNTERBALANCING EVIDENCE?

CONSTITUTIONAL PROVISIONS INVOLVED (EXCERPTED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES)

ARTICLE (IV.)

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED.

ARTICLE (V.)

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The petitioners were charged on bills of indictment with the offense of felonious breaking or entering and felonious larceny. On May 8, 1972, petitioners appeared in the Superior Court of Chatham County with counsel and entered a plea of not guilty. The trial started immediately and, at the close of all of the evidence, a verdict of guilty was returned, as to both defendants to the offenses of breaking and entering and larceny. From these verdicts and judgment of imprisonment, the petitioners appealed. The North Carolina Court of Appeals affirmed these convictions and the Supreme Court of North Carolina denied the defendants joint petition for Writs of Certiorari. Copies of the opinions of the North Carolina Court of Appeals and the Supreme Court of North Carolina are appended to the petition.

STATEMENT OF FACTS

The petitioner, Ronald Eugene All, accompanied by petitioner, Carlton Oscar Weaver, was stopped by an officer of the Virginia State Police on March 20, 1971. The officer had observed the petitioner, All, driving a truck with a portion of its windshield obscured by a piece of cardboard. Under a Virginia statute, driving with any obstruction over the windshield is a traffic violation. Code of Virginia, Sec. 46.1-290.

While the petitioners were pulled to the side of the road, the officer inspected the driver's license, registration card, and license tag and found that the truck was registered in the name of the petitioner, Weaver's wife. (Rp. 11) When the officer walked to the rear of the truck, he could see something inside the truck bed and he could, also, smell the odor of ham emanating from the vehicle. (Rp. 11) The officer then stepped up upon a tire on the side of the truck and peered into the open bed thereof at the cargo which consisted of several hundred loose hams and several packages of refrigerated type sliced ham. (Rpp. 12 and 14) There was further testimony from the officer, that he could not let the defendant drive the truck off in the condition that it was in. (Rp. 16) And, in that the defendant driver was from out-of-state, he was arrested rather than cited. (Rp. 14) Subsequent to this arrest, the officers received a radio broadcast regarding a breaking and entering of a meat packing plant in North Carolina which related the theft of

a large quantity of hams. (Rp. 17) There was possible inadmissable evidence in the record of the trial below regarding certain bolt cutters. (Rp. 19) (although it is arguable that probable cause for the search revealing the bolt cutters existed independent of the inadmissible confession) There was sufficient, strong, and convincing counterbalancing evidence regarding clearly identified hams in plain view in a open truck, (Rp. 12), fibers from a sweater similar to the one worn by the petitioner, Weaver, found at the point of the break-in, (Rpp. 45-57), and a truck matching the description of the vehicle driven by the petitioner, All, seen in the vicinity of the packing plant on the night of the robbery (Rpp. 27-28). The hams observed in the open bed of the truck and partially visible through open boards on the side of the vehicle bore the name, Hickory Mountain Farms, (Rp. 12) which was the business reporting the theft. (Rpp. 26-31).

The State will accept the petitioners' view of the remaining evidence insofar as it does not disagree with the above additions and explanations.

ARGUMENT

The petitioners' principal argument for the granting by this Court of their joint petition for Writs of Certiorari are founded upon their belief that the North Carolina Court of Appeals advanced invalid reasons to uphold their convictions below. The defendants, specifically, complain that the lower court should not have justified the investigation of the contents of the truck driven by the defendants upon the ground that such examination was proper to safeguard its contents while the vehicle was being taken in because of its inoperable condition. (windshield was then missing on the drivers side of the vehicle and a piece of cardboard had been inserted) The defendants make a number of arguments to the effect that there was no Virginia State Statute allowing an impoundment for a missing or an obscured windshield; that there was no reason to take the truck into custody in Virginia, (there being an absence of a regulatory statute reguiring windshields); and that the investigation amounted to a sham inventory designed to coverup an illegal search.

The State will answer the petitioners' arguments broadly by citing Mr. Justice Douglas' concurring opinion in the case of *Harris*

v. U.S. 390 U.S. 234 (1968) which opinion is cited, also, by the petitioners. (for the proposition that the truck that was searched was unlawfully in police custody) In the *Harris* case, (supra), the defendant was arrested on a robbery charge and his car, pursuant to statute, was impounded. The State statute in that case allowed officers the right to search the impounded automobile for valuables in order to secure them for the owner. And, while the car was parked, after being taken in, a police officer discovered a registration card (indicating vehicle belonged to another) on the front seat when opening a door to roll up a window. Mr. Justice Douglas, in concurring with the majority which upheld the introduction into evidence of the registration card as not being the fruit of an illegal search, made these findings at pages 236 and 237 of that opinion:

> "Though *Preston v. U.S.*, 376 U.S. 364, is not mentioned in the Court's opinion, I assume that it has survived because in the present case (1) the car was lawfully in police custody, and the police were responsible for protecting the car; (2) while engaged in the performance of their duty to protect the car, and not engaged in an inventory or other search of the car, they came across incriminating evidence".

The State of North Carolina will strongly submit that the attributes of the police investigation of petitioners' truck were within the scope of Mr. Justice Douglas' guidelines. In this case, the truck had seriously defective equipment, (no windshield on drivers side–Rp. 11), which condition posed a hazard to both the petitioners themselves and the travelling, public. And, due to the extremity of this hazard, (as opposed to a single defective taillight, etc.), it was imperative that the truck be removed from the highway immediately. This preliminary restraint of the vehicle at the scene leading to what the investigating officer knew to be a more lengthy impoundment while the windshield was being installed was entirely lawful. It would make little difference that the investigation of the contents of the truck was made upon the temporary impoundment on the side of the road prior to the arrest or subsequent thereto. The necessity that the windshield would, in all events, need to be replaced and the truck impounded during this repair was apparent to the arresting officer at the time he first signaled the truck to the side of the road. At that moment, (before the arrest), the officer could validly see the need for an investigation of the contents of

the truck with the thought of safeguarding them for return to the owner when the truck was towed in and the problem corrected. The discovery of the hams, therefore, at this juncture, before the petitioner's arrest for reckless driving would not have stronger attributes of the officer, "looking for evidence". than after his arrest. It should be considered, therefore, that the truck was in lawful police custody. Further, it can be argued that the discovery of the hams was effected during the officer's performance of his duty to protect the truck and its cargo. And, during the performance of his duties as a police officer, (ie. checking license against registration on mechanically defective vehicle in a place where he had a lawful right to be), the officer viewed something in the truck that smelled like ham. (Rp. 11) The officer's looking over the side of the open truck to decide the quantity and nature of the cargo which resulted in his aroused suspicions with regard to the large quantity of unrefrigerated perishable hams presented circumstances which were certainly analogous to *Harris v. United States*, 390 US 234 (1968). In that case, an officer, while raising a window upon a defendant's car to protect it during an investigation of the defendant himself, discovered a registration card indicating ownership of the vehicle of another lying openly upon the car seat. In each instance, perishable items (interior of car and unrefrigerated ham) were sought to be protected from the elements.

It should be noted that in Mr. Justice Douglas' opinion, (supra), he condemns an investigation of an automobile without a search warrant or during an inventory. The State would interpret that the "inventory" to which Mr. Justice Douglas refers in his concurring opinion is not identical to, nor comprehends, the type of "inventory" alluded to by the North Carolina Court of Appeals in its decision below. It is submitted that Mr. Justice Douglas is speaking of "sham" inventories in those cases where unnecessarily detailed searches are made under the guise of an inventory unrelated to the safeguarding of cargo or protecting it from spoilage. Often, these inventories are made upon a "routine" or "trumped up" traffic charge. See *People v. Muniz*, 4 Cal. App. 3d 562, 84 Cal. Rptr. 501; *Commonwealth v. Dussell*, 439 Pa 392, 266 A 2d 659.

When we consider the above aspects of the investigation of the petitioners' truck, it can be argued that the guidelines for the investigation of a vehicle without a search warrant as enumerated by Mr. Justice Douglas have been met in the present case.

The State, having generally answered the major question presented by the petitioners, will now briefly examine certain subsidiary points raised with regard to the impoundment question. The petitioners excerpt certain Virginia statutes to show the lack of State authority to impound the truck and, upon this basis, argue that a search was not lawful. The State has previously discussed the very real necessity, (ie. visually defective equipment), that prompted the initial restraint of the truck. The defendants seem to be arguing that the rest of the windshield glass could be removed, (or in this case, the cardboard removed), and the truck could have gone along its way, there being no legal basis for detaining it. The State would submit that the truck, operating with cardboard in its windshield, was in clear violation of Virginia law. Section 46.1-290 of the Virginia Code contains a clear prohibition against the placing of nontransparent materials, (here cardboard), upon windshields of motor vehicles. The truck, therefore, (regardless of the fact that the cardboard could be removed), was, by law, at that time not in a condition to be operated upon the highways of the State of Virginia and, until fixed, would have to remain on the right of way of U.S. Highway No. 220. (Rp. 11) Whether the cardboard could or could not be removed is not the question; the fact is that it was not removed and the truck, by statute, could not be operated. The vehicle, therefore, existing in a condition that prohibited its movement, would constitute a hazard for oncoming motorists who should require the use of that portion of the right of way. Section 46.1-2 of the Virginia Code provides that if a vehicle is left on the highway in a position which constitutes a hazard to traffic, or if it is left unattended on the highway for more than twenty-four hours, "the police may remove it or have it removed to the nearest storage garage for safekeeping". (emphasis added). The criteria of this statute are clearly met in the present case. The truck, on account of its statutorily defective equipment, would have to be left on highway right of way and would therefore, constitute a hazard. The statute further provides that "the police may remove it or have it removed to the nearest garage for safekeeping." The fact that the truck was parked outside of the jail building rather than in a storage garage was no indication that it was not to be taken to such a facility for safekeeping. The defendant was taken from the scene of the original arrest to the jail, advised of his constitutional rights, asked a few questions, and taken to the magistrate for a bond hearing. (Rpp. 7-21) It would be reasonable that the truck which had been driven by the petitioners would be

parked temporarily outside of the jail while these more pressing matters were being taken care of inside the building. In any event, the final disposition of the truck would not invalidate the initial safeguard investigation on the highway preparatory to its detention. (It should be noted that, independent of any right of investigation prior to an impoundment, Section 46.1-8 of the Virginia Code authorizes uniformed officers to stop and inspect vehicles. (including an investigation of its load)*

For the sake of argument, if it should be found that the theory that the hams were discovered during an examination to safeguard them pursuant to a contemplated detention of the truck is unavailing, the investigation and discovery can be justified upon other grounds. The State would urge that the hams found in the petitioners' truck were in "plain view" and that the evidence introduced concerning their discovery was not a product of a search. Where no search arises, the constitutional guarantee against unreasonable searches and seizures is not applicable. 47 Am. Jur., *Searches and Seizure*, Section 20; *State v. DuBoise*, 279 N.C. 73, 181 SE 2d 393 (1971). It has been established that, under certain circumstances, the police may seize evidence in plain view without a warrant. The "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but, inadvertantly, discovers an incriminating object. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 Law Ed. 2d 564, 91 S. Ct. 2022. (1971). A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession. However, a police officer may seize and use what he sees in plain sight if he is at a place where he lawfully entitled to be. *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963); *State v. Fry*, 13 N.C. App. 39, 185 SE 2d 256 (1971).

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*Section 46.1-8 of the Virginia Code provides as follows: *Stopping vehicles for inspection or to secure information....Any peace officer who shall be in uniform or who shall exhibit his badge or other sign of authority shall have the right to stop any motor vehicle, trailer or semitrailer, upon request or signal, for the purpose of inspecting the motor vehicle, trailer or semitrailer as to its equipment and operation, its manufacturers serial or engine number or its contents or load, if such motor vehicle, trailer or semitrailer is a property carrying vehicle or for the purpose of securing such other information as may be necessary.* (Code 1950, § 46-16; 1958, c-541).

> "What the plain view cases have in common is that the officer in each of them has a prior justification for an intrusion in the course of which he came inadvertantly across a piece of evidence incriminating the accused". *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). (See also *Harris v. United States*, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992.)

In the present case, the State would contend that, at the time of the petitioners' detention on the side of the road for a serious safety violation, the officer, during an examination of the outside of the truck, was in a place that he had a legal right to be. And, that while investigating the exterior of the vehicle, he could see something inside and could, also, smell the odor of ham lying in the open bedded truck. (Rp. 11). The perishable hams in the truck, therefore, were within his "plain view". No search warrant was required for him to investigate "hidden places" for them. The "plain view" doctrine does not mean, as applied to this case, that the article could not be in plain view unless the officer could see it as he stood erect. There would be no question that the hams would be in plain view if the officer had climbed a tree or his own car, or had been on a hill and looked down into the truck and saw the hams. In accord, See, *State v. Mallory*, 336 S.W. 2d 383, cert. den. 364 U.S. 852, 5 L. Ed. 2d 75, 81, S. Ct. 99, reh. den. 364 U.S. 925, 5 L. Ed. 2d. 264, 81, S. Ct. 287. (1960, Mo.); *Goodwin v. U.S.*, 121 App. D.C. 9, 347 F. 2d. 793, cert. den. 382 U.S. 855, 15 L. Ed. 2d. 93, 86 S. Ct. 107, cert. den. 382 U.S. 920, 15 L. Ed. 2d. 234, 86 S. Ct. 298, cert. den. 382 U.S. 920, 15 L. Ed. 2d. 234, 86 S. Ct. 300; *State v. Brinkley*, 25 Conn. Supp. 216, 200 A. 2d. 247 (1963); *State v. Fry*, 13 N.C. App. 39, 185 SE 2d 256.

If we should assume that the act of the officer in climbing upon the vehicle was a search, it was not an unreasonable search prohibited by the Fourth Amendment.

> "An unreasonable search has been defined as 'an examination or inspection without authority of law of one's premises or person, with a view to the discovery of... some evidence of guilt, to be used in the prosecution of a criminal action.' 47 Am. Jur.,

Searches and Seizures, Sec. 52". *State v. Ratliff*, 281 N.C. 397 (1972)

The officer was clearly not looking for evidence (upon the initial detention on the side of the highway for a traffic violation), to be used in the prosecution of a criminal action. There was absolutely no nexus between the hams and any criminal behavior at the time one of the petitioners was arrested for reckless driving. See *State v. Howard*, 274 N.C. 186, 162 SE 2d 495 (1968).

In concluding its remarks concerning this phase of its answer to the petitioners' joint petition for writs of certiorari, the State would remark that the petitioners cite *Holland v. State*, 93 Okla. Cr. 180, 226 P. 2d. 448 (1951) as supportive of a position that a sham inventory was conducted in the present case.

In *Holland* (supra), deputies waited for a truck known to be carrying intoxicating liquor and "trumped up" a charge of reckless driving as a pretext for a warrantless search of the truck. (deputy climbed up on truck to view the liquor) The dissimilarities in the two cases are too apparent for further discussion.

The defendant, also, (with regard to sham inventories) cites *U.S. v. Adams*, 424 F 2d 175 (5th Cir. 1970), wherein the defendant was stopped while intoxicated and arrested. While at the jail, his vehicle was searched for identification of its ownership and evidence was found that it had been stolen. The Sheriff contended that the search was in preparation for the impoundment of the vehicle. The court held that the search was in violation of the defendant's Fourth Amendment rights. It is interesting to note that in *Adams* (supra), the police searched the vehicle in great detail, even to the extent of removing a part of the rear seat to enter the trunk.

The defendant, also, argues that the North Carolina Court of Appeals adopted an erroneous standard for its application of this Court's "Harmless Constitutional Error Doctrine". Specifically, the petitioners complain of the lower court's holding that the admission into evidence of the bolt cutters, although possibly erroneous, (as based upon unlawfully obtained confession and warrantless search too remote from arrest), was, notwithstanding, harmless error because the remaining evidence was more than sufficient to support the convictions. The petitioners then cite *Fahy v. Connecticut*, 375

US 85 (1963) and *Chapman v. California*, 386 US 18 (1967) for the proposition that the harmless error standard that should have been applied by the lower court, (in consonance with these opinions by this Court), should have been whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction.

The State would respond to this argument raised by the petitioners by citing *Chapman* (supra), the identical case relied upon by the petitioners. In that case at pages 21 and 22, this Court stated:

> "We are urged by petitioner to hold that all federal constitutional errors, regardless of the facts and circumstances must always be deemed harmful ... we decline to adopt any such rule .... We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless not requiring the automatic reversal of the conviction." (The evidence complained of related to the prosecutor's repeated references to the defendant's failure to testify).

Considering this language from *Chapman* (supra), the State would aver that this Court would weigh the evidence in the application of its Harmless Error Standard. The State would not interpret this case to mean, (as the petitioners contend), that this Court would require a reversal in every instance that a constitutional error was present in the record. Clearly, the Court felt in *Chapman*, (supra), that the repeated mention of the defendant's failure to testify so tainted the entire proceeding that the jury could not have rendered a fair verdict. It is, also, apparent that this Court felt in *Fahy v. Connecticut*, 375 US 85 (1963) that the introduction into evidence of a can of black paint was of such significance as to irreparably damage the entire proceeding. In *Fahy*, (supra), unlawfully obtained evidence of a can of black paint, (used in painting swastikas on synagogues), became the focal point in every phase of the trial to connect the defendant to the offense charged.

These cases are markedly dissimilar to the case now under consideration. In this proceeding, there exists in the transcript of

the trial possibly inadmissible evidence concerning bolt cutters. A preponderance of valid evidence, exclusive of this supposedly inadmissible evidence, remained in the setting of this case to render such error harmless. *Chapman v. California*, 386 US 18 (1967). In addition to the evidence concerning the petitioners' cargo of perishable hams containing markings indicating the name of the packing company from which a theft of such hams was reported, (Rpp 12 and 29), there was evidence in the record of fibers from a sweater similar to the one worn by Mr. Weaver having been found at the break-in, (Rpp 45-57), and of a truck matching the general description of the one driven by the defendant, all, in proximity to the packing plant on the night of the robbery. (Rpp 27-28).

The remaining evidence in the record of this proceeding in no way related to the evidence of bolt cutters. And, standing independently, required no support from such evidence for its validity, possessing sufficient strength upon its own ground to support petitioners' convictions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the joint petition for writs of certiorari should be denied. The respondent submits that the facts of this case showed no violation of the petitioners' rights, constitutional or otherwise.

Respectfully submitted,

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Attorney General of
North Carolina

Charles M. Hensey

CHARLES M. HENSEY
Assistant Attorney General

Counsel for the State of
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CERTIFICATE OF SERVICE

I, Charles M. Hensey, Assistant Attorney General with the North Carolina Department of Justice and Counsel for the State of North Carolina, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of August, 1973, I served three copies of the Brief of Respondent, State of North Carolina, in opposition to Joint Petition for Writs of Certiorari on counsel representing Petitioners, Ronald Eugene All and Carlton Oscar Weaver as follows:

By mailing three copies each in a duly addressed envelope, first class postage prepaid, to Brice I. Bishop and Thomas Canafax, Jr., of the law firm of Shimmel, Hill and Bishop, Attorneys at Law, 1819 H Street, N.W., Washington, D. C. 20006; to Thomas F. Loflin, III, of the law firm of Loflin, Anderson and Loflin, P. O. Box 1315, Durham, North Carolina 27702; to Mitchell M. McEntire (who did not execute the said joint petition but who, also, appeared as attorney below) of the law firm of Harris and McEntire, Attorneys at Law, P. O. Drawer 471, Graham, North Carolina 27253.

It is further certified that all parties required to be served have been served.

Charles M. Hensey

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SEP 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-
No. 1625

RONALD EUGENE ALL, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

CARLTON OSCAR WEAVER, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

REPLY OF PETITIONERS TO RESPONDENT'S OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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REPLY OF PETITIONERS TO RESPONDENT'S OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

The petitioners submit this reply to new matters raised by the brief of respondent in opposition to joint petitions for writs of certiorari, as follows:

1. The respondent's reliance upon *Harris* v. *U.S.*, 390 U.S. 234 (1968) (pages 5-7 of the Opposition), to justify the roadside search of the petitioners' vehicle is misplaced. For unlike *Harris* (1) the vehicle here

was not in police custody when searched and (2) the inspection was not shown by the evidence to be for the purpose of protecting the cargo. Even if it were for such purpose, the police officer's act of physically intruding upon the vehicle to inspect its contents constituted a search, which cannot be equated with the benign act of the police officer in *Harris* of rolling up the windshield of the impounded automobile, pursuant to which he discovered the evidence there. The analogy which respondent attempts to draw with the *Harris* case is fallacious and certainly too attentuated to warrant the denial of certiorari.

2. The respondent errs in asserting that the Virginia Statutes authorized impoundment here. Neither of the two grounds for which Section 46.1-2 of the Virginia Code authorizes impoundment were shown to exist. (1) The vehicle had not been left unattended for more than 24 hours on the highway and (2) the record discloses no evidence that leaving the petitioners' vehicle parked on the shoulder of the four lane highway would have constituted a hazard to traffic. The remainder of the respondent's argument is addressed to whether and under what conditions the police, in exigent circumstances, may search the vehicle of a person arrested for a traffic offense. However, this is the very issue which the Court has never answered and is one of the reasons urged for the granting of certiorari (pages 10 to 14 of Joint Petition for Writs of Certiorari).

3. The respondent also cites a section of the Virginia Code authorizing a police officer to search at will and without probable cause the contents and cargo of a motor vehicle. The decision below did not rely upon

this provision and, because of the statute's breadth, it raises the same grave constitutional problems which the petitioners have already asserted as grounds for certiorari here (pages 6 to 8 of the Joint Petition for Writs of Certiorari).

4. Contrary to the respondent's contention, the "plain view" doctrine has no application. *Holland* v. *State,* 93 Okla. CR. 180, 226 P.2d 448 (1951), (where the court ruled that in stepping onto a truck in order to peer over the side boards at the cargo, the police officer had engaged in a search.) Although the police officer, here, saw some indistinguishable items through the cracks in the side boards of the truck when he was checking the license plate, he could not ascertain the true nature of the cargo, the extensiveness of the load, or the brand names of the items until he climbed on the fender and looked into the truck bed.

Accordingly, the hams were not in plain view of the officer while he was standing on the ground. It is no answer that he might have obtained substantially similar information had he been in a helicopter or at some other vantage point. For, in fact, he chose to use an unlawful search to obtain such information. Besides, it is merely speculative that he could have identified the cargo or obtained such precise information about it from some other hypothetical vantage point.

* * * * *

For the foregoing reasons, and for the reasons stated in the Joint Petition for Writs of Certiorari the petitioners respectfully request that certiorari be granted.

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v.

STATE OF NORTH CAROLINA, *Respondent*

On Joint Petition for Writs of Certiorari to the Supreme Court of North Carolina and the Court of Appeals of North Carolina

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PETITION FOR REHEARING

This petition for rehearing is filed on the grounds that subsequent to the Court's denial of certiorari, an intervening circumstance of controlling or substantial effect has occurred. After this Court refused to grant certiorari, with Justice Douglas voting to grant the writs, a Virginia state court ruled on facts similar

to those here that a purported police inventory constituted an unreasonable search in violation of the Fourth Amendment. That decision is in direct conflict with the ruling of the North Carolina Court below. Moreover, the resulting anomaly underscores the unsettled state of the law on a recurring Constitutional issue and creates an arbitrary disparity in the interpretation of the Fourth Amendment in criminal proceedings.

1. The petitioners here sought Supreme Court review of the decision below that the impoundment for safekeeping and the ensuing inventory of the truck they were operating, did not violate the Fourth Amendment strictures against unlawful searches and seizures. The police stopped the truck driven by Petitioner Ronald All because of a defective windshield and, prior to arresting him for that offense, inventoried the cargo and seized the truck. Consequently, the impoundment and inventory occurred before the petitioners had been afforded an opportunity to make bail and retain possession of the truck. Pursuant to this premature and unauthorized inventory, the police discovered a quantity of hams which were later introduced as evidence of stolen property. The petitioners' motion for the suppression of evidence were denied and they were convicted. The Court of Appeals of North Carolina sustained the admissibility of the hams as evidence and further ruled that the admission of burglary tools found pursuant to an unconstitutional interrogation was harmless error because the hams and other evidence were sufficient to support the convictions. (Petition for Certiorari, pp. 14-16). The petitioners sought writs of certiorari which this Court denied on October 9, 1973.

2. Thereafter, on October 10, 1973, in *Commonwealth* v. *Sifuentes,* Cr. Docket No. 18801, the Circuit Court of Fairfax County, Virginia, Judge Birch Milsop presiding, ordered the suppression of evidence obtained in a purported inventory under similar circumstances. In that case, the defendant was arrested in a motel for the misdemeanor of carrying a concealed weapon. Thereafter, the police seized the defendant's rented truck which was parked in the motel parking lot and upon purportedly making an inventory they discovered contraband marijuana. The judge suppressed the evidence of the marijuana on the grounds that the impoundment had occurred before the defendant had been afforded an opportunity to make bail and was not warranted by the circumstances. On these facts, the court ruled that the impoundment and inventory were not justified and constituted an unreasonable search and seizure in violation of the Fourth Amendment. (App. to Pet. Reh. 1a-9a).

3. In each case, the police prematurely searched the vehicle of the defendant pursuant to an arrest for a minor offense, before it had been determined that detention should be imposed. Therefore, apart from the fact that impoundment and inventory were not authorized by statute or regulation, neither were these measures justified as necessary for the protection of private property. In neither case was the search related to the offense for which the arrest was made. Indeed, the principal difference in the two cases is in the result reached: in one, the defendant went free and in the other the defendant did not. This cruel anomaly is further aggravated by the fact that though the petitioners here were tried in North Carolina, the arrests and search were made in Virginia by the Virginia authorities.

4. Whether a premature impoundment and inventory may be used to circumvent the holding of *Dyke* v. *Taylor Implements Manufacturing Co.*, 391 U.S. 216 (1967), forbidding a vehicle search which is unrelated to the cause of the arrest, has vexed the state courts. The disparity in rulings on this question has spawned confusion in the state of the law which this Court should end. Compare, *People* v. *Miller*, 7 Cal. 3d. 219, 101 Cal. Rptr. 860, 496 P.2d. 1228 (1972); *Gonzales* v. *State*, ———Okla. Cr.———, 12 Cr. L. Rptr. 2537 (decided March 13, 1973) with *Boulet* v. *State*, 511 P.2d 168 (Ariz. Sup. Ct. 1973); *State* v. *Ruiz*, 511 P.2d. 172 (Ariz. Sup. Ct. 1973).

Accordingly, the petitioners respectfully urge the Court to grant this petition for rehearing, and issue writs of certiorari on the search and seizure issue and the related issue of constitutionally harmless error.

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Certificate

I herewith certify, in accordance with Rule 58 of the Rules of this Court, that the petition for rehearing is presented in good faith and not for delay, and further, that the petition is restricted to intervening circumstances of substantial or controlling effect.

BRICE I. BISHOP

APPENDIX

APPENDIX

APPENDIX

IN THE CIRCUIT COURT OF FAIRFAX COUNTY
VIRGINA

Criminal Docket No. 18801

COMMONWEALTH OF VIRGINA, *Plaintiff*

vs.

ROBERT D. SIFUENTES, *Defendant*

Circuit Courtroom No. 4
Fairfax County Courthouse
Fairfax, Virginia

Tuesday, June 18, 1973

The above-entitled cause came on for trial, before THE HONORABLE BIRCH MILSAP, Judge, in and for the Circuit Court of Fairfax County, Virginia, at 10:30 o'clock a.m.

APPEARANCES:

On behalf of the Commonwealth:
STEVEN MERRILL, ESQ.

On behalf of the Defendant:
MICHAEL BRANHAM, ESQ.
JOHN N. MCCUNE, ESQ.
JOSEPH L. GIBSON, ESQ.

[142] **Terry W. Baker**

was called as a witness on behalf of the Defendant, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Branham:

Q. Please give your name and occupation? A. Terry W. Baker, Fairfax County Police Officer.

Q. Officer Baker, I direct your attention to February 23, 1973, and ask if you were on duty at that time. A. Yes, sir.

Q. Did there come a time in the course of your duty when you were called to 6100 Richmond Highway, the Holiday Inn Motel? A. Yes, sir.

Q. Would you please tell the Court what caused you to go to the Holiday Inn Motel, and the sequence of events that happened thereafter? A. What caused me to go there?

Q. Yes. A. I was advised by the dispatcher to go there in reference to a man with a gun. Upon my arrival a man approached me and said Mr. Sifuentes had a gun. I approached Mr. Sifuentes and asked him for some identification, an operator's license, and I asked him at that time, "Do you have a gun", and he said, yes, he did.

I took the gun out of his right coat pocket, jacket pocket, and arrested him for carrying a concealed weapon.

* * * * * * * * * *

By Mr. Branham:

Q. After you left Groveton Sub-Station — after you had arraigned and placed the Defendant in the cell block, did you return to the scene? A. Yes, I did.

Q. What was the purpose of your returning to the scene? A. The key, the individual Ford Motor Company key that I found in the Defendant's pocket. When I inquired where the key came from, or what vehicle the key fitted, he denied having any knowledge of the key. I figured if I checked the register at the Holiday Inn, I could find out if he drove a vehicle in there.

Q. Prior to this time, had you gotten the registration card from the Motel? A. Not at the time, I got the information off it, his name and everything, made sure it was the right person.

* * * * * * * * * *

Q. From the time you arrested the Defendant until the time you returned to the scene with Sergeant Goldman, was an officer on duty, surveilling the vehicle? A. Yes, sir.

Q. Did you place that officer on such duty? A. Sergeant Goldman did.

* * * * * * * * * *

[46] **Robert Keyes,**

called as a Witness by Counsel for the Commonwealth, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination

By Mr. Branham:

Q. Would you please state your name and occupation for the Court, please? A. Robert Keyes, Investigator, Fairfax County Police.

Q. And were you so employed on February 23, 1973? A. Yes, sir, I was.

Q. Did there come a time on this date when you became aware of a matter and were called to investigate such matter? A. Yes, sir.

Q. Would please tell the Court in your own words when you became aware of it and what you did? A. Sir, approximately, around 9:00 p.m. of February I received a radio call advising me to respond to the Groveton Substation to investigate an abduction that had taken place. Upon arrival I talked to Officer Baker and Sergeant Goldman of our Department, and it was pointed out to me that a complaint subject by the name of Charles Sprouse, white male, 17, came in and reported an abduction.

I was briefed by Officer Baker and Sergeant Goldman of the situation. I then interviewed the victim and the Defendant.

Q. Would you please tell us what time you interviewed the victim? A. Yes, sir. The interview took place at 2120 hours, which would be 9:20 p.m.

Q. Would you please tell us where this interview took place? A. The Sergeant's office at the Groveton Substation.

* * * * * * * * * *

Q. Do you recall at what time you placed the charges against the Defendant? A. Between 10:00 and 10:15 p.m.

Q. And after that would you please tell the Court what occurred? A. Sir, I secured a warrant charging the Defendant with abduction, served the warrant in, I believe, your presence, advised him of the bond. He was arraigned. I then talked to Sergeant Goldman and Officer Baker again, at which time I received a key and a registration card from the Holiday Inn where the Defendant had checked in, and I talked to Sergeant Blevins, informed him of the case and the action I was about to take.

Q. I believe you just stated that—

The Court: You say you obtained from the Defendant a key to the Holiday Inn?

The Witness: I obtained from Officer Baker a key to a vehicle registered to the Defendant and a registration card as follows:

[124] Direct Examination of Officer Ronald Kerzaya

By Mr. Branham:

Q. Would you please state your name? A. Yes, sir. Officer Ronald F. Kerzaya.

Q. And your occupation? A. Fairfax County police officer.

Q. And were you so employed February 23, 1973? A. Yes, sir, I was.

Q. And would you please state to the Court what your duties were at this time? A. I was on ASAP duty, Alcohol Safety Action Program duty.

Q. Is this a program or a duty that is of some importance to the County of Fairfax? A. Yes, sir.

Q. Did there come a time when you were notified and asked to report to a Holiday Inn at 6100 Richmond Highway? A. Yes, sir.

Q. Would you please tell the Court what occurred there? [126] A. Yes, they summoned a uniform officer to standby a vehicle, which I responded to at that location and stood by at the request of Sergeant Goldman.

Q. And could you please tell the Court approximately what time you arrived at the scene? A. I arrived at the scene at approximately 8:30.

Q. And when you arrived at the scene, who did you meet? A. Sergeant Goldman and Officer Baker.

Q. While you were at the scene were you given any specific instructions regarding your duties there? A. Just to watch the van-type truck which was parked in the parking lot.

Q. Were you given any specific instructions regarding watching the van? A. Just to keep people away from it.

Mr. Branham: Your Honor, I'm looking for a statement I took from him—

(Pause.)

By Mr. Branham: (Resuming)

Q. Could you be more specific regarding the instructions that were given to you? A. Yes, sir. I was advised by Sergeant Goldman to remain in the parking lot and watch a van, which he pointed out, a rental truck; and not to let anyone near it and watch that no one entered it.

Q. And how long did you remain at this post? A. Approximately two hours.

Q. And at the end of two hours what occurred? A. I was relieved by Officer Stark.

* * * * * * * * * * *

Q. In the process of the conversation would you please tell the Court what decisions were made regarding this case? A. I had reason to believe that a vehicle operated or owned by the Defendant was at the Holiday Inn. He

disclaimed any knowledge of this upon interview. The key was taken from his person, and the registration form from the Holiday Inn showed a truck and tag number checked in by him.

At this time I placed him under arrest for an abduction. A $15,000 bond had been set by the Commonwealth Attorney. It was my responsibility at that time to secure his vehicle.

Q. At what time did you secure the vehicle? A. Approximately 11:30.

Q. Could you be more specific? A. No, sir.

Q. I am sorry. Go ahead. A. We went down to secure the vehicle. We opened it up and then went back to the Holiday Inn and advised the desk officer, or the desk clerk, that we were taking the vehicle. At approximately 11:15 when we looked at my watch, we were on 495, about 10 minutes away from the Holiday Inn.

Q. So, your best recollection would be sometime between 11:30 and 11:35 you took possession of the vehicle? A. Or before—somewhere between 11:15—

Q. Were you ever in the vehicle prior to this time? A. No, sir.

Q. What was the condition of the vehicle when you found it? A. Locked runnable parked on the parking lot of the Holiday Inn.

* * * * * * * * * *

Q. When you opened the vehicle and after it was open to view to all parties, what occurred? A. There was a briefcase sitting between the seats. There was a box between the seats, and a load of boxes in the back. We removed the covering from one box to see what was in there. At that time what appeared to be a brick of marijuana was found in the box.

* * * * * * * * * *

By Mr. Branham: (Resuming)

Q. Officer Keyes, after you took possession of the vehicle, what did you do with the vehicle?

Mr. Merrill: Your Honor, at this point I am going to object. Obviously, the contraband was found at this point. If it is admissible, it is admissible because of what took place from this point, back in time. And I would just submit that anything forward in time—the entire situation has drastically changed, obviously. There is 800 pounds of marijuana in there.

There is probable cause at this point to believe there is marijuana, more than probable cause to believe from the experience, to be sure that there is marijuana, or pretty sure it is marijuana or a substance exactly like it. I will submit that anything after this is irrelevent to this particular question, or whether this should be admitted into evidence, because it doesn't have anything to do—since we are not saying it is a search. We are not saying it is an unlawful arrest—a lawful arrest. If they had anything to do with the vehicle, it had to do with before the time the marijuana was found.

The Court: Do you agree with the position?

Mr. Branham: Yes, I agree with that position, but I am in the process of laying a basis for the photographs and what he saw at the time he entered the truck. I will believe that these photographs will prove that.

The Court: It would seem to me that under the theory that the evidence which you are attempting to have suppressed was found not, according to the Commonwealth, as a result of a search, incident to a crime, but the inventory and the checking out of the vehicle subject to an impoundment by a Defendent that has been charged with a crime. If the Court rules that such impoundment and inventory violated the Constitutional rights of the Defend-

ent, then would suppress any evidence obtained as a result thereof. That would conclude it without going further, and if the court would rule that the inventorying of the vehicle was a proper procedure by the Police Department. It doesn't fall that way, one way or the other right now.

* * * * * * * * * *

Ruling on Motion to Suppress

THE COURT: The Court has, since the testimony and argument by Counsel back in June on the motion to supress, and the ruling of the Court at that time to deny it, has given great consideration to the testimony received at that time.

And cases, none being exactly in point, and as late as yesterday going and reading all testimony, argument, the Cabbler case, the memorandum as filed by defense Counsel. That all parties agreed that, if this was in effect an inventory as intended by the police, that it would be valid.

But under the facts of the case, the Court would conclude that it amounted to a search and seizure, then the evidence should be supressed.

The Court has to look at the facts of the case as they develop. And has to try to determine from those facts what actually did exist, rather than what was in the minds of the investigating officers and arresting officers at the time. And the Court in no way means to be critical of investigators of the case, because of the heavy burden upon them.

But here the Court looking, and trying to make a short summary as to what actually occurred with the charge for the misdemeanor for concealment at 5:00 p.m. in the afternoon, the setting of bond at $250.00, and then at 8:39 p.m., Sergeant Goldman calling in a uniform officer to watch the truck. With specific instructions, not to let anyone go near it, in quoting Sergeant Goldman.

So at 8:39 p.m. no one could go near the truck. If the Defendant had not [sic][1] made bond, he could not have removed the panel truck. He had no access to it, according to what the Court would have to assume would be a logical interpretation of Sergeant Goldman to the police officer at that time. The uniform officer kept the vehicle under surveilance until relieved by another police officer, Officer Stark.

At 9:00 p.m. Officer Keyes received a call at Tyson's Corner, as to a possible abduction, arriving at the station at 9:20, interviewing the necessary people, and placing a charge of abduction at 10:00 to 10:15 p.m. which is 5 to 5 hours and 15 minutes after the arrest for the misdemeanor. An hour and a half after the vehicle is placed under surveilance by the police department.

From there on then others were called in. The Court can stop at that point. Suspicions, and so forth that occurs subsequent to the abduction charge, does not effect [sic] the decision of the Court.

The Court would have to conclude that regardless of what was in the minds of Offcer Keyes and Goldman, the fact that this vehicle was placed under surveilance with specific instructions at 8:39 p.m. What occured at 10:00 p.m. can not undo what was done at 8:39 p.m. And it would be the ruling of the Court that the Court was in error in June in denying the motion to supress.

And the Court at this time would have to grant the motion. The motion to suppress is granted.

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[1] The use of "not" is a mistake of the reporter and should have been omitted.